UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 54

Docket No. DE-1221-10-0115-A-1

Michael S. Guy,

Appellant,

v.

Department of the Army,

Agency.

April 16, 2012

Peter C. Rombold, Esquire, Junction City, Kansas, for the appellant.

Eric L. Carter, Esquire, Fort Riley, Kansas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

OPINION AND ORDER

¶1 The agency has petitioned for review of the addendum initial decision in which the administrative judge awarded the appellant $27,373.50 in attorney fees. For the reasons set for below, we DENY the agency's petition and AFFIRM the addendum initial decision as MODIFIED by this Opinion and Order, still awarding $27,373.50 in fees.

BACKGROUND

¶2 On December 3, 2009, the appellant, a GS-7 Paramedic, filed an individual right of action (IRA) appeal with the Board. Initial Appeal File (IAF), Tab 1. He alleged that, in retaliation for a July 11, 2007 e-mail in which he raised concerns

about patient safety and possible rule violations, the agency took the following personnel actions: a July 30, 2007 reprimand; two counseling memoranda dated November 7, 2007, and April 10, 2009; a 2-day suspension, dated May 9, 2008; and four nonselections to the position of Supervisory Emergency Services Coordinator. *Id*. The administrative judge determined that the reprimand and 2-day suspension, which the appellant had elected to grieve using a negotiated grievance procedure, were outside the scope of the appeal, but that the appeal was otherwise within the Board's jurisdiction.[1] A merits hearing was conducted over four days in July and August 2010.

¶3 In an initial decision dated November 30, 2010, the administrative judge found that the appellant made a protected disclosure, and that the disclosure was a contributing factor in the two counseling memoranda and the first nonselection, but not the three subsequent nonselections. The administrative judge further found that the agency proved by clear and convincing evidence that, even in the absence of the appellant's protected disclosure, it would have issued the April 10, 2009 counseling memorandum, and would not have selected him for the supervisory position. Finally, the administrative judge found that the agency failed to prove by clear and convincing evidence that it would have issued the November 7, 2007 counseling memorandum in the absence of the appellant's whistleblowing. Accordingly, she ordered the agency to cancel the memorandum, expunge all references to it from the appellant's personnel file(s), and return him as nearly as possible to the position he would have been in absent that counseling memorandum. Neither party filed a petition for review of the initial decision,

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[1] The administrative judge nonetheless found that the reprimand and suspension actions were relevant insofar as the appellant alleged that they reflected a pattern of reprisal. After considering in depth the agency's reasons in support of those actions, she concluded that the reprimand evidenced a retaliatory motive on the part of the responsible agency officials, and that the suspension action neither supported nor undercut the appellant's claim. Initial Decision at 22-26.

which became final on January 4, 2011. The Board subsequently referred the matter to the Office of Special Counsel (OSC) to investigate and take appropriate action under 5 U.S.C. § 1215.

¶4 On February 28, 2011, the appellant filed a motion for attorney fees. Attorney Fee File (AFF), Tab 1. In support of his motion, he submitted three invoices, which together listed 166.16 attorney hours at $225 per hour, for a total of $37,386.00. AFF, Tabs 1, 4, 8. In addition to hours devoted to the IRA proceeding before the Board, the invoices included time spent in connection with the preceding OSC complaint, a subsequent petition for enforcement, and 14 hours devoted to the attorney fee petition itself. *Id*. In response to the administrative judge's motion closing the record, the appellant acknowledged that certain of the hours were not compensable. AFF, Tab 8. He reduced his fee request by $5,400 to account for 19 hours devoted to personnel actions on which he did not prevail, and 5 hours devoted to compliance issues and a nonselection that was not at issue in the underlying IRA appeal. *Id*.

¶5 In a June 28, 2011 addendum initial decision, the administrative judge granted the appellant's fee motion in part. AFF, Tab 17, Addendum Initial Decision. She found that the appellant was the prevailing party, and therefore entitled to an award of attorney fees under 5 U.S.C. § 1221(g)(2). She further found that the claimed hourly rate of $225 was reasonable, but that the award should be reduced to account for the appellant's limited success in the underlying IRA appeal. Having determined that it was possible to do so by eliminating specific hours devoted to unsuccessful claims, she reduced the award by an additional 8 hours, which she found to have been spent solely in connection with the nonselections. In addition, she reduced an additional 5.5 hours which she found to have been spent on compliance issues. The administrative judge further found that the 21 hours claimed for the appellant's jurisdictional response were unreasonable and excessive, and eliminated 7 of those hours. Over the agency's objections, she found that the appellant was entitled to compensation for all

attorney time spent filing a complaint with OSC, as the complaint was a jurisdictional prerequisite for the IRA appeal. In sum, the administrative judge awarded $27,373.50, representing 121.66 hours of attorney time. *Id*.

¶6 On petition for review, the agency argues that the administrative judge erred in finding that $225 per hour was a reasonable rate, and failed to eliminate all the hours devoted to the appellant's unsuccessful claims. Petition for Review File (PFR File), Tab 1. In particular, the agency objects that the administrative judge awarded fees for all hours spent on various Board pleadings that only briefly addressed the November 7, 2007 counseling memorandum, and were devoted in part to claims on which the appellant did not prevail, e.g., the nonselections. The agency further contends that the administrative judge should not have awarded fees for hours spent on the preceding OSC complaint, as some of that time was also devoted to matters on which the appellant did not ultimately prevail. According to the agency, the administrative judge should have either attempted to segregate additional hours, or else reduced the award by a percentage to account for the appellant's limited success. In either event, the agency contends, the award of $27,373.50 is unreasonable, and renders the November 7, 2007 memorandum "the most expensive counseling memorandum in history." *Id*. The appellant has responded to the agency's petition, but he does not contest the administrative judge's findings. PFR File, Tab 5.

ANALYSIS

Determining a reasonable fee award

¶7 Although the appellant obtained relief on only one of the contested personnel actions, he was nonetheless a prevailing party in the underlying IRA appeal, and is therefore entitled to an award of reasonable fees under 5 U.S.C. § 1221(g). *See Smit v. Department of the Treasury*, 61 M.S.P.R. 612, 617-18 (1994). The question to be decided is the amount of the reasonable fee award.

¶8 In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Supreme Court set forth a scheme for determining a reasonable fee award in a case where, as here, the prevailing party did not obtain all the relief requested. The most useful starting point, the Court explained, is to take the hours reasonably spent on the litigation multiplied by a reasonable hourly rate. *Id*. at 433; *see Driscoll v. U.S. Postal Service*, 116 M.S.P.R. 662, ¶ 10 (2011) This is the "lodestar" which the Board uses in determining the fee award. *Lizut v. Department of the Navy*, 42 M.S.P.R. 3, 7-8 (1989). The initial calculation should exclude hours for which the prevailing party failed to provide adequate documentation, and should also exclude hours that were not reasonably expended. *Hensley*, 461 U.S. at 433-34.

¶9 In the second phase of the analysis, the lodestar may be adjusted upward or downward based on other considerations, including the crucial factor of the "results obtained." *Id*. at 434. In some cases, it may be appropriate to reduce the lodestar to reflect the party's failure to obtain all the relief he requested. However, as we explained in *Driscoll*, a reduction of the lodestar to account for the party's success on only some of his claims for relief is distinct from a finding that the hours devoted to unsuccessful claims or issues were not reasonably spent. *See Driscoll*, 116 M.S.P.R. 662, ¶ 10. In accordance with *Hensley* and *Driscoll*, we will determine the hours that were reasonably spent on the underlying appeal as a whole before addressing what adjustment, if any, should be made to the lodestar in light of the appellant's incomplete success in the underlying IRA appeal.

¶10 We note that, of the 166.16 hours initially claimed, 10.5 hours were devoted to a separate compliance proceeding on which the appellant did not prevail, and are therefore not compensable. The invoices also include 14 hours of attorney time devoted to the attorney fee petition itself, *see* AFF, Tab 8 at 12, 18-19, for which the appellant may be entitled to compensation. *See Driscoll*, 116 M.S.P.R. 662, ¶ 30. However, because the degree of success the appellant has obtained on his attorney fee motion is not the same as the degree of success he obtained on

the underlying appeal, we will conduct a separate analysis of the hours claimed in connection with the attorney fee proceeding. *See id.*

Initial lodestar calculation

¶11 The burden of establishing the reasonableness of the hours claimed in an attorney fee request in an attorney fee request is on the party moving for an award of attorney fees. *Casali v. Department of the Treasury*, 81 M.S.P.R. 347, ¶ 13 (1999). The party seeking an award of fees should submit evidence supporting the hours worked and exclude hours that are excessive, redundant, or otherwise unnecessary. *Hensley*, 461 U.S. at 433-45. The administrative judge need not automatically accept claimed hours, but may disallow hours for duplication, padding, or frivolous claims, and impose fair standards of efficiency and economy of time. *See Casali*, 81 M.S.P.R. 347, ¶ 14; *Foley v. U.S. Postal Service*, 59 M.S.P.R. 413, 423 (1993); *Kling v. Department of Justice*, 2 M.S.P.R. 464, 472-73 (1980). If, however, the administrative judge decides not to award fees for hours of service that are adequately documented by attorneys, she must identify those hours and articulate the reasons for their elimination. *Crumbaker v. Merit Systems Protection Board*, 781 F.2d 191, 195 (Fed. Cir. 1986), *modified on other grounds*, 827 F.2d 761 (Fed. Cir. 1987). If an administrative judge has concerns about deficiencies in a motion for attorney fees, she should afford the party an opportunity to address the matter before rejecting the claims. *Wilson v. Department of Health & Human Services*, 834 F.2d 1011, 1012 (Fed. Cir. 1987).

¶12 The administrative judge found that, of all hours claimed, 7 hours, incurred on February 4, 2010, were unreasonably spent. It appears that the administrative judge may have eliminated those hours without first communicating her doubts to the appellant and providing him an opportunity to answer. *See Wilson*, 834 F.2d at 1012; *Driscoll*, 116 M.S.P.R. 662, ¶ 12. However, since neither party has contested the administrative judge's finding on review, we will not disturb it.

¶13 We further agree with the decision of the administrative judge to include in the lodestar all hours reasonably devoted to the appellant's OSC complaint. Fees

claimed for legal work performed in a related prior proceeding, such as the appellant's complaint before OSC, may be compensable if: (1) the claimed portion of work performed in the other proceeding was reasonable; and (2) and the work performed in the other proceeding, or some "discrete portion" of it, significantly contributed to the success of the Board proceeding and eliminated the need for work that would otherwise have been required in the Board proceeding. *McGovern v. Equal Employment Opportunity Commission*, 42 M.S.P.R. 399, 408 (1999). As a general rule, the Board will not exclude from a fee request time reasonably spent outside the Board proceeding but in furtherance of the same goal. *Russell v. Department of the Navy*, 43 M.S.P.R. 157, 161 (1989), *modified by Garstkiewicz v. U.S. Postal Service*, 50 M.S.P.R. 476, 478-79 (1991). Because the exhaustion of administrative remedies before OSC is a jurisdictional prerequisite for filing an IRA appeal, the work performed in the OSC proceeding contributed significantly to the appellant's success before the Board. Moreover, we discern no error in the administrative judge's implicit finding that it is impossible to identify a "discrete portion" of that work which was solely responsible for the appellant's success on the jurisdictional issue.

¶14 In sum, excluding the 10.5 hours devoted to compliance issues, the 14 hours devoted to the attorney fee request itself, which we consider separately below, and the 7 hours which the administrative judge found to have been unreasonably spent, we conclude that 134.66 hours were reasonably spent on the OSC complaint and Board proceedings in the underlying IRA appeal. The initial lodestar is therefore to be calculated by multiplying those 134.66 hours by a reasonable hourly rate.

¶15 In order to establish the appropriate hourly rate, the attorney fee application must be accompanied by a copy of the fee agreement, if one exists, as well as evidence of the attorney's customary billing rate for similar work. *Casali*, 81 M.S.P.R. 347, ¶ 9. The customary billing rate may be established by showing the hourly rate at which the attorney actually billed other clients for similar work

during the period for which the attorney seeks fees, or, if the attorney has insufficient billings to establish a customary billing rate, then by affidavits from other attorneys in the community with similar experience stating their billing rates for similar work. *Id.*

¶16 Here, the appellant submitted with his initial filing a copy of the fee agreement that he and his counsel signed on March 25, 2009, which states, in pertinent part, that payment shall be earned at a rate of $225 per hour, and that "[i]t is agreed that the current reasonable and customary charges for [the attorney's] time is $225.00 per hour." AAF, Tab 1. In his affidavit, the appellant's attorney stated that $225 is a "median hourly rate for this geographical area, where fees for competent counselors range from $200.00 to $250.00 per hour, excluding outlier rates." *Id.*, Tab 4. He subsequently explained that $225 is his customary rate, the same hourly rate he has billed other MSPB clients for similar work during the period for which he seeks in this matter, and the same hourly rate he charges his non-MSPB clients, and that, as far as he is aware, there are no other attorneys in the community who regularly take on MSPB cases. *Id.*, Tab 8.

¶17 We agree with the administrative judge that the appellant's evidence on this issue is sufficient. He has met his burden by establishing not only that he agreed to pay his attorney $225 per hour, but that $225 per hour is his attorney's customary rate. *See Stewart v. Department of the Army*, 102 M.S.P.R. 656, ¶ 17 (2006) (the appellant established the appropriate hourly rate for an attorney fee award where his attorney submitted a copy of the fee arrangement showing that he charged the appellant $275 per hour, and an affidavit attesting that he charged other clients $275 per hour for similar work), *overruled on other grounds by Shelton v. Environmental Protection Agency*, 115 M.S.P.R. 177 (2010).

¶18 Multiplying the hourly rate of $225 by the 134.66 hours found to have been reasonably spent on the OSC and IRA proceedings yields an initial lodestar figure of $30,298.50. We now turn to the question of what adjustment, if any, should be

made to the lodestar in light of the appellant's limited success. *See Driscoll*, 116 M.S.P.R. 662, ¶ 21.

Adjusting the lodestar

¶19 Where, as here, a prevailing party makes more than one claim for relief, and the claims involve a common core or facts or are based on related legal theories, the fee determination should reflect the significance of the overall relief obtained in relation to the hours reasonably expended. *Smit*, 61 M.S.P.R. at 618-19. In a case where the party seeking fees obtains "substantial" success, despite not succeeding on every claim or issue, he should recover a fully compensatory fee, encompassing all hours reasonably spent on the litigation. *Hensley*, 461 U.S. at 435. If, on the other hand, the party seeking fees has achieved only "partial or limited success"—which is inarguably the case here—an award based on the hours reasonably spent on the litigation as a whole times an hourly rate may be an excessive amount, even where the claims were interrelated, nonfrivolous, and raised in good faith. *Id*. at 436.

¶20 In the latter scenario, the tribunal awarding fees has discretion to make an equitable judgment as to what reduction is appropriate. *Id*. at 436-37. It may adjust the lodestar downward by identifying specific hours that should be eliminated or, in the alternative, reducing the overall award to account for the limited degree of success. *Id*.; *Smit*, 61 M.S.P.R. at 619. Our case law, as well as that of our reviewing court, indicates that the former method should be used in cases where it is practicable to segregate the hours devoted to related but unsuccessful claims, and that only in cases where the administrative judge is unable to do so should she impose a percentage reduction. *See Boese v. Department of the Air Force*, 784 F.2d 388, 391 (Fed. Cir. 1986); *Smit*, 61 M.S.P.R. at 619-20. Generally, the administrative judge is in a better position than the full Board to determine whether it is possible to reduce the award by specific hours, as she is more intimately familiar with the adjudication of the

underlying appeal.[2] *See, e.g.*, *Driscoll*, 116 M.S.P.R. 662, ¶ 28 (deferring to the administrative judge's decision to impose a percentage reduction). Even in cases where a percentage reduction is appropriate, it is the administrative judge who is in the better position to determine the appropriate amount of the reduction. *See Smit*, 61 M.S.P.R. at 619.

¶21 Here, the administrative judge determined that it was possible to eliminate specific hours devoted to unsuccessful claims, and we find it appropriate to defer to her judgment on that point. *Cf. Driscoll*, 116 M.S.P.R. 661, ¶ 28. We also discern no error in her decision to eliminate 27 hours—including the 19 hours previously identified by the appellant—which she found to have been devoted exclusively to personnel actions on which the appellant did not prevail.[3] We specifically reject the agency's suggestion that the additional 8 hours identified by the administrative judge were the "only" deductions made to account for the appellant's unsuccessful claims. *See* PFR File, Tab 1 at 17.

¶22 Moreover, the resulting figure of $24,223.50 does not so shock the conscience that we should second-guess the administrative judge's considered judgment that the amount fairly reflects the appellant's degree of success. The fact that the appellant prevailed on one of five personnel actions does not entail that he should be awarded only a similar fraction of the fees requested. *See*

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[2] The agency mistakenly cites *Howard v. Office of Personnel Management*, 79 M.S.P.R. 172, ¶ 7 (1998), for the proposition that "if there was no hearing on the fee dispute, the Board's determinations on fee motions may be made without deference to the administrative judge." *See* PFR File, Tab 1 at 6. The holding of *Howard* is limited to requests for attorney fees incurred in connection with attorney fee proceedings in which no hearing was held. Here, the appellant seeks fees incurred in connection with the underlying IRA appeal. *Howard* is pertinent only to the extent the appellant also seeks compensation for attorney fees incurred in connection with the instant proceeding. *See infra*, ¶ 23.

[3] We note that by eliminating those 27 hours, the administrative judge arrived at the same result that would have obtained had she instead found it appropriate to reduce the initial lodestar by 20.05 percent.

Hensley, 461 U.S. at 434-35 (criticizing the district court's use of a mathematical formula comparing total number of issues argued with those that actually prevailed as a method for determining the attorney fee award). Furthermore, while the counseling memorandum alone may not be of great import, that is not the only measure, or even the most significant measure, of the appellant's success in this appeal. The Board did not merely order the agency to rescind that memorandum; it also made a public finding that the agency engaged in illegal whistleblowing reprisal, and referred the matter to OSC for investigation and possible disciplinary action against the responsible agency officials. The appellant has since alleged further retaliatory actions by the agency—including a notice of proposed suspension issued the day after the initial decision awarding attorney fees—and the Board's finding of whistleblowing reprisal in this case may offer him a significant advantage in any subsequent OSC or Board proceedings. Finally, the award of attorney fees in this or any other successful IRA appeal serves the public interest insofar as it may encourage employees and attorneys to pursue remedies for acts of whistleblowing reprisal, thereby discouraging agencies from engaging in such acts, which in turn serves the goal of eliminating government wrongdoing. *See* 5 U.S.C. § 1201 note, § 2(b) (purpose of the Whistleblower Protection Act is to "to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and help eliminate wrongdoing within the Government"). In sum, we find no basis for disturbing the portion of the award attributable to the OSC and IRA proceedings.

Additional fees

¶23 In addition to fees for hours expended on the OSC complaint and IRA appeal, the appellant is entitled to compensation for reasonable fees incurred with respect to his successful attorney fee petition. *See Driscoll*, 116 M.S.P.R. 662, ¶ 30; *Russell*, 43 M.S.P.R. at 162. Here, the administrative judge did not find that any of the hours claimed for work performed in connection with the attorney fee petition were unreasonably spent. Because no hearing was held in the

attorney fee proceedings below, we need not defer to her determination that the 14 claimed hours were reasonable. *See Howard*, 79 M.S.P.R. 172, ¶ 7. However, the agency has not disputed her finding on that point, and we discern no basis for disturbing it. *See Driscoll*, 116 M.S.P.R. 662, ¶ 30. Multiplying the 14 hours reasonably expended times an hourly rate of $225 yields a lodestar of $3150.00. Because the appellant has obtained substantial success with respect to his attorney fee petition, we award the entire sum. *See id*. Adding that figure to what we have found to be a reasonable fee award for the OSC complaint and IRA proceedings, we arrive at a total award of $27,373.50.

ORDER

¶24 We ORDER the agency to pay the attorney of record $27,373.50 in fees. The agency must complete this action no later than 20 days after the date of this decision. *See generally* Title 5 of the United States Code, section 1204(a)(2) (5 U.S.C. § 1204(a)(2)).

¶25 We also ORDER the agency to tell the appellant and the attorney promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. We ORDER the appellant and the attorney to provide all necessary information that the agency requests to help carry out the Board's Order. The appellant and the attorney, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶26 No later than 30 days after the agency tells the appellant or the attorney that it has fully carried out the Board's Order, the appellant or the attorney may file a petition for enforcement with the office that issued the initial decision on this appeal, if the appellant or the attorney believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant or the attorney believes the agency has not fully carried out the Board's

Order, and should include the dates and results of any communications with the agency. *See* 5 C.F.R. § 1201.182(a).

¶27 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.182(a).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.